death of her husband. Any money she might earn, would be the result of her labour and not of his death...

This principle also found favour in the English case of *Howitt v. Heads* [1973] 1 QB 64.

*Yap Ami's* case cited by the defendants' Counsel ought to be distinguished from the facts of the case itself. In that case, the dependant widow did not expend any effort or energy of her own in getting the payment from her deceased husband's former firm. The firm just continued to pay the dependant widow in the same amount and manner as if the deceased's husband was still alive. She did not even 'lift a finger to earn that amount'. However, in our present case the situation is otherwise.

Under these circumstances, I reject the defendant's second contention.

In the light of this Court's findings aforesaid, I allow this appeal with cost and vary the order of the Sessions Court Judge to as follows:

(a) the dependency sum should be replaced with a sum of RM500 per month instead of RM300.

(i) As a multiplier for pre-trial loss of dependency is agreed upon on 36 months, the sum to be awarded for pre-trial loss for the 1st plaintiff should be RM500.00 x 36 = RM18,000.00;

(ii) As a multiplier for post-trial loss of dependency is agreed upon on 72 months, the sum to be awarded for post-trial loss to the 1st plaintiff should be RM500.00 x 72 = $36,000.00.

(b) There should be no change in the award for special damages which were agreed upon by the parties at RM11,800 to the 1st plaintiff;

(c) the above sums for both general and special damages should be reduced to 50% and paid by the defendants to the 1st plaintiff together with interest and cost as stated by the Sessions Court.

As for the 2nd plaintiff there should be no change in Sessions Court order for awards granted to her are not affected by this appeal.

**MALAYAN UNITED FINANCE BERHAD**

**v.**

**WILTEX (M) SDN BHD & 6 ORS.**

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM J.
[SUIT NO D4-23-2524-87]
25 FEBRUARY 1994

***PRACTICE AND PROCEDURE: Summary judgment - Order 14 RHC 1980 - Appeal - Illegality of contract - Illegality not pleaded in statement of defence but raised in appeal - Whether Court bound to consider question.***

***BANKING & FINANCE: Loan transaction by finance company - Loan secured by first legal charge over land - Finance company disbursed loan prior to execution of charge - Whether loan amounted to unsecured advances - Whether transaction thereof illegal - Section 20(1) Finance Companies Act 1969.***

The plaintiff in this case is a licensed finance company. By a letter of offer dated 14 August 1984 the plaintiff offered the first defendant a loan of RM 540,000 on condition that the first defendant execute a first legal charge over a certain property and the second to the seventh defendants execute a joint and several guarantee in respect of the loan. The said offer was accepted by the first defendant on 22 August 1984.

By two seperate disbursements made on 13 February 1985 and 22 October 1985 respectively, the plaintiff released the whole of the loan to the first defendant. By this time however, the charge over the aforesaid property had yet to be executed by the first defendant and so also the letter of guarantee by the other six defendants. Execution of the two instruments was effected only on 31 December 1985. The first defendant defaulted in payment and in the subsequent O. 14 application by the plaintiff the Senior Assistant Registrar gave the plaintiff liberty to enter summary judgment against all the seven defendants.

The defendants appealed and argued that this was not a proper case for summary judgment as the loan transaction was tainted with illegality by reason of s. 20 of the Finance Companies Act 1969 which expressly prohibited the grant of unsecured advances. The defendants did not however plead the question of illegality in their statement of defence and the issue that arose

was whether in the circumstance the Court could dwell upon the question of illegality and if so, whether the loan transaction was in fact carried out in contravention of s. 20 of the Finance Companies Act, 1969 and therefore illegal.

**Held:**

**[1]** This was not a proper case for summary judgment. When the plaintiff disbursed the money on 13 February 1985 and on 22 October 1985 they did so without any security as envisaged in the letter of offer. In other words the plaintiff released the money to the first defendant as unsecured advances. This is contrary to s. 20(1) of the Finances Companies Act 1969 and the transaction was therefore illegal. The execution and registration of the first legal charge thereafter was immaterial as it could not legalise the illegal transaction.

**[2]** Since the advances were made illegally, the consideration or object of the letter of guarantee was also unlawful. The letter of Guarantee executed on 31 December 1985 which constituted an agreement between the guarantors and the plaintiff is thus void by virtue of s. 24 of the Contracts Act 1950.

**[3]** In the present case the question of illegality was raised by Counsel for the defendants and it was argued by both Counsel. Although this is an appeal from the decision of the Senior Assistant Registrar, the appeal was heard by way of rehearing. As the question of illegality was brought to the Court's attention, the Court is bound to consider it notwithstanding that the question was not pleaded in the statement of defence.

*[Appeal allowed].*

**Cases referred to:**

*United Malayan Banking Corporation Bhd v. Palm & Vegetable Oils (M) Sdn Bhd [1983] 1 MLJ 206* ***(refd)***

*Wai Hin Tin Mining Co. Ltd v. Lee Chow Beng [1968] 2 MLJ 251* ***(foll)***

*Natha Singh v. Syed Abdul Rahman & Anor [1962] 28 MLJ 265* ***(foll)***

**Legislation referred to:**

Contracts Act 1950, s. 24
Finance Companies Act 1969, s. 20(1)
National Land Code, s. 242
Rules of the High Court 1980, O. 14

*For the plaintiff - L.S. Ng; M/s Sothi & Ang*
*For the defendants - Jennifer Tay; M/s S.K. Tay & Co.*

**JUDGMENT**

**Dr. Zakaria bin Mohd Yatim J:**

This is an appeal by all the seven defendants against the decision of the Senior Assistant Registrar who ordered that the plaintiff be at liberty to enter summary judgment against all the defendants under O. 14 of the Rules of the High Court for a sum of RM680,001.29 together with interest thereon at the rate of 13% per annum on yearly rests from 1 August 1978 till the date of realisation.

The plaintiff is a licenced finance company having its registered office at MUI Plaza, Jalan P. Ramlee, Kuala Lumpur. According to the statement of claim the plaintiff granted to the first defendant, a private limited company having its registered office in Subang Jaya, a fixed loan of RM540,000 at an interest rate of 12.5% per annum on yearly rests together with additional interest of 3% per annum above the prescribed rate on monthly rests for any overdue installments. The plaintiff averred that the loan was granted to the first defendant subject to the security of a first party charge on the land held under H.S.(D) 9416, P.T. 4055 (lot 8236) Mukim Damansara, Daerah Petaling created under a memorandum of charge and the annexure dated 31 September 1985 executed by the first defendant in favour of the plaintiff. In consideration of the plaintiff agreeing to grant the said loan to the first defendant, the second to the seventh defendants, by a letter of guarantee dated 31 December 1985, jointly and severally agreed, on demand to pay to the plaintiff any sum due and owing to the plaintiff by the first defendant. The first defendant had defaulted and there was an outstanding balance of RM658,154.75 together with interest. Letters of demand were sent to the guarantors.

At the hearing of the appeal, the first defendant was absent. Miss Jeniffer Teh represented all the six guarantors. Miss L S Ng represented the plaintiff.

Miss Jeniffer Teh raised three grounds of appeal. My decision was however based on the third ground. In the third ground Miss Jeniffer Teh submitted that the loan transaction was illegal because at the time the money was disbursed there was no security within the meaning of s. 20 of the Finance Companies Act 1969. Miss L S Ng argued that the question of illegality was not raised in the statement of

defence and the omission to plead in the statement of defence could not be made good by affidavit evidence. She cited *United Malayan Banking Corporation Bhd v. Palm & Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206.

The first question for the Court to determine is whether the loan transaction was an illegal transaction in contravention of s. 20 of the Finance Companies Act.

By a letter of offer dated 4 August 1984, which was duly accepted by the first defendant on 22 August 1984, the first defendant was to execute "First legal charge over land and building held under Title No. HS(D)9416 No PT 4055 (Lot R236) Mukim Damansara in the District of Petaling" (the said land) and the second to the seventh defendants were to execute a joint and several guarantee in respect of the loan. I have read the plaintiff's statement of account as at 31 December 1985 which shows that a sum of RM462,800 was disbursed on 13 February 1985 and the remaining sum of RM77,200 was disbursed on 22 October 1985. (See Encl. 5, Exhibit MUF - 4A). The fourth defendant, in paragraph 5 of his affidavit (Encl. 22) averred that the plaintiff, in Encl. 22 - Exhibit MUF 4A, admitted that the sum of RM468,800 was disbursed on 13 July 1985 and the second sum of RM77,200 was disbursed on 22 October 1985. With regard to the said land, Form 16A (s. 242 of the National Land Code) was executed on 31 December 1985. The charge was registered on 19 February 1986. The letter of guarantee was executed by the second to the seventh defendants on 31 December 1985.

Section 20(1) of the Finance Companies Act provides:

> (1) No licensed finance company shall grant unsecured advances, loans or credit facilities in excess of, in the aggregate and outstanding at any one time, five thousand ringgit to any person, other than a licensed finance company, a bank or any other financial institution approved by the Central Bank.

The words "unsecured advance, loan or credit facility" mean

(a) an advance, loan, credit facility made without security; or
(b) an advance, loan or credit facility secured only by a guarantee.

In my opinion when the plaintiff disbursed the money on 13 February 1985 and on 22 October 1985, they did so without any security as envisaged in the letter of offer. In other words the plaintiff released the money to the first defendant as unsecured advances. This is contrary to s. 20(1) of the Finance Companies Act and the transaction was therefore illegal. The execution and the registration of the first legal charge could not legalise the illegal transaction.

The letter of guarantee which was executed on 31 December 1985 in fact constituted an agreement between the guarantors and the plaintiff. The preamble states:

> To:
>
> Malayan United Finance Berhad
>
> In Consideration Of your agreeing at my request to advance to or on behalf of Wiltex (M) Sendirian Berhad a Company incorporated in Malaysia and having its registered office at No 95-A, Jalan SS 21/37, Damansara Utama, Petaling Jaya (hereinafter referred to as 'the Borrower') the sum of Ringgit Five Hundred and Forty Thousand (RM540,000) only as a loan (hereinafter called 'the said loan') for such period and on such terms and condition as you may in your absolute discretion stipulate,
>
> we The Undersigned, Wan Goong Yin (I/C No 6005139) of No 17, Jalan SS 1/1C, Petaling Jaya, Goh Chew Eang (I/C No 8264185) of No 2, Jalan 2/30, Petaling Jaya, Thor Wang Poh (I/C No 4410655) of No 15, Jalan SS 18/4F, Subang Jaya, Selangor, Ab. Kadir Bin Yaacob (I/C No 4213583) of No 10, Jalan SS 3/49, Petaling Jaya, Mohd. Sabki Bin Razali (I/C No 4935685) of No 37, Jalan 4/3D, Shah Alam, Selangor and Goh Swee Hock (I/C No 8008618) of No 17, Jalan SS 1/1C, Petaling Jaya,
>
> Hereby Agree Undertake And Guarantee ...
>
> 1. To pay you on demand all every and any part of the said loan and interest thereon ...

Since the advances were made illegally, the consideration or object of the letter of guarantee was also unlawful. The letter of guarantee is therefore void. Section 24 of the Contracts Act 1950, provides *inter alia*:

> The consideration on object of an agreement is lawful, unless -
>
> (a) it is forbidden by a law
> (b) it is of such a nature that, if permitted, it would defect any law ...
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful.

> Every agreement of which the object or consideration is unlawful is void.

I shall now consider the point raised by Miss L S Ng, that is, the question of illegality was not pleaded in the statement of defence. In *Wai Hin Tin Mining Co. Ltd v. Lee Chow Beng* [1968] 2 MLJ 251. Chang Min Tat J. decided that the Court could take notice of the illegality although it was not pleaded by the defendant. In his judgment at page 253, the learned Judge said:

> On the question whether in the absence of any specific defence on the ground of illegality ... I could take cognisance of such illegality, ... I thought the law ... was clear that in some cases the Court would itself take notice of the illegality of the contract in which the plaintiff was suing if it appeared on the force of the contract and from the evidence before it by either party, although the defendant had not pleaded the illegality ...

In *Natha Singh v. Syed Abdul Rahman & Anor* [1962] 28 MLJ 265. Hepworth J. said at page 266 as follows:

> It is clear from these cases that unless a defendant raises the defence of the illegality of the contract on the pleadings then he cannot rely upon it, **except where the contract is on the face of it illegal or its illegality is brought to the notice of the Court,** even the Court has no right to intervene.
> [Emphasis added]

I respectfully agree with the passages quoted above. In the present case the question of illegality was raised by Miss Jeniffer Teh and it was argued by both Counsel. Although this is an appeal from the decision of the Senior Assistant Registrar, the appeal was heard by way of re hearing. Since the question of illegality was brought to my attention, I considered myself bound to consider it although the question was not pleaded in the statement of defence.

For the reasons stated above I am of the view that this was not a proper case for summary judgment. I accordingly allowed the appeal with costs.

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**ONG SENG KEE**

**v.**

**LEE SOON FATT**

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 12-8-93 (T)]
9 OCTOBER 1993

***PRACTICE & PROCEDURE: Stay of execution - Application by tenant/defendant dismissed by Sessions Court - Claim by plaintiff for vacant possession, rentals and mesne profits allowed by Sessions Court - Notice of Motion filed at High Court for stay of execution pending appeal - Defendant to show "special circumstances" to justify stay.***

This was an application by the applicant/defendant for stay of execution pending an appeal against the decision of the Sessions Court, Taiping. The order of the Sessions Court was for the applicant/defendant to give up vacant possession in respect of Stall No. 1761, Jalan Kamunting, Taiping together with ground rentals at RM180, *mesne* profits and costs.

**Held:**

**[1]** Once the wooden zinc stall is removed, development would start and this would in turn cause serious or irreparable injury to the appellant/defendant if the stay is not granted.

**[2]** As there were materials in the affidavit of the appellant/defendant for granting stay of execution, order in terms of the application was granted.

*[Stay of execution granted. Costs to be costs in the cause].*

**Cases referred to:**

*Atkins v. Great Western Railway Co. 11 TLR 400* ***(refd)***
*Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. (No. 2) [1976] 1 MLJ 131 FC* ***(refd)***
*Serangoon Garden Estate Ltd. v. Ang Keng [1953] 19 MLJ 116* ***(refd)***
*Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86* ***(refd)***
*Tilling & Anor. v. Whiteman [1978] 3 All ER 1103 CA* ***(refd)***
*Ajaib Singh v. Jeffrey Fernandez [1971] 1 MLJ 139* ***(refd)***

**Legislation referred to:**

Rules of the High Court 1980, O. 15 r. 6(1)